THE ROLE OF CO-OPERATIVE LAW

by Mr. David Horton.

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One could be forgiven for thinking that administering the law as it relates to co-operative activity is a big enough burden for one man to carry without adding to that burden by asking him to talk about the purpose of co-operative law. This is not a subject which could normally be described as fascinating and I fear that any friendships I have managed to retain throughout my term as Registrar may well not survive the duration of my talk.

The law, which is an ever expanding domain affects all of us every day. Sometimes we are thankful for it as it protects us from the wrongdoer or the misguided, sometimes we find it irksome and restrictive to say the least.

After a little reflection you might agree with me that the law delays us, puts us to extra work and treats us as children. So it is, for example, that we may not legally exceed the speed limit in a built up area whatever the time of day; or give proper directions for the administration of our estate without completing certain formalities including committing them to writing and having witnesses.

But despite these difficulties society has decided from hundreds of years of experience that it is in the common good that we should be subject to laws. We have found that they protect us from others and from ourselves.

Co-operative law is not so very different in its various functions from the general body of law. It exists to recognise a particular way of operating, to set down the general rules applicable and to provide penalties for any who dare to disregard its dogmatic directions.

Although overall this is both necessary and desirable it is not without the disadvantages I have already referred to - of a arbitrariness, of rigidity and of restrictiveness. There is a further related disadvantage of which I plan to say more later; that co-operative law may tend to reduce the scope of evolutionary development of the movement thus causing some degree of fossilisation.

You will perhaps understand and offer indulgence if in the course of this paper I refer frequently for obvious reasons to my own State of New South Wales. In that State for many years we encompassed all forms of co-operative activity under the Co-operation Act. But in 1967 a separate enactment was passed to regulate Permanent Building Societies and another in 1969 to regulate Credit Unions. I believe that these forms of co-operative activity have benefited greatly from this approach.

Although to a greater or lesser extent both arms of the movement follow co-operative principles their mode of operation is considerably different from the societies which now remain under the Co-operation Act and they have enjoyed the advantage of having legislation tailored to their individual needs.

In passing may I say that the advent of separate legislation, which recognises the existence of different problems and needs in these branches of co-operation, has helped to avoid stereotyping

and has allowed these branches to develop according to their own particular objectives.

To a lesser extent the move to separate legislation has occurred or is occurring in other States, with the result that now both the Permanent Building Societies and the Credit Unions hold their own national conventions regularly and have fairly strong State and National groupings. Representatives of these societies and credit unions are here at this convention but perhaps they will forgive me if I primarily direct my remarks today to questions affecting the more general type of co-operatives such as rural and trading societies and community advancement societies.

While mentioning these latter categories may I say that I see scope for the elimination of 'labels' within our Co-operation Act now that credit unions and permanent building societies have their own legislation. It is my hope that in the reasonably near future some of these distinctions can be removed and with them some of the limitations on the activities which may be pursued.

Let us look in a little more detail at why we have co-operative law. There are a number of reasons which occur to me and these are an expression of its role.

Firstly it exists to give recognition and status to that form of associations of persons known as the co-operative.

Of course co-operatives existed before there was any statute recognising them but for that reason they were governed only by the general law. A co-operative had no legal status apart from being a collection of persons with a common goal - just like any other collection of persons who had come together for a particular end. Without the authority of a statute, co-operatives would simply have continued as unincorporated associations.

But by virtue of the legislation co-operatives are separate legal entities which may contract, own and deal with property, sue and be sued. The co-operative's members do not hazard all their assets in support of the co-operative but their personal liability is limited in accordance with the statute, a great improvement on the days before incorporation was available.

Nevertheless it must be realised that this very act of recognising the movement and giving it legal status, at the same time tended to formalise and categorise and set limits to what was a dynamic concept, born of a need, which was adapting to best fulfil that need. Perhaps I might be permitted to choose an exaggerated illustration to make my point. It could be compared to capturing a living animal and putting it into suspended animation or even putting it into a museum.

There is a really no escape from this dilemma. The movement needed legislation yet that legislation could not hope to retain the fluidity of the development stage. However, I hope that the existence of the problem is recognised so that the effects of this fossilisation process can be minimised.

Because it is a matter which has concerned me for some time I would like to dwell on it a little. I believe it is a significance to every branch of co-operation.

There seem to me to be two main ways in which co-operation is formalised and restricted by legislation. On the one hand the co-operative concept becomes defined and no real leeway is left for further development or mutation or even experimentation. Frankly I find it difficult to believe that co-operatives should be tied down to a 19th century conception. Perhaps the pioneers who conceived the principles in the first half of that century would have adopted some modifications had they been starting out today.

The second area that suffers is the day to day operations of societies. Here societies encounter frustrations because the Act does not take account of all the facets of business competition and trading practice. Our Chairman for this session is Mr. Les Gibbs who is no doubt well known all over Australia as a very prominent co-operator. He has just stepped down from the position of General Manager of the Store in the Newcastle area - New South Wales' biggest retail trading co-operative.

He knows how necessary it has been to retain flexibility in keeping ahead of keen competition from outside retailers. This has often been complicated by the fact that the Act does not envisage a great deal of flexibility.

I could go on at quite some length in developing this aspect. But I realise that this would result in my giving a different paper from that shown on the programme. My point is that the law whilst essential does circumscribe co-operatives activities somewhat. I believe we should all be vigilant to minimise undesirable side effects. There is a great need for research and controlled experimentation in my opinion.

Following from that first point, co-operative law goes on to lay down the general pattern of operations of such societies. By and large they are only "creatures of statute" and not otherwise specifically recognised in law, and their powers are confined to those conferred by the Act which governs them. The silence of the Act on a matter of this nature would be regarded as having the effect of preventing them from operating in the area in which there is silence. Under this heading also would fall the various machinery type provisions setting out matters such as who may be members, who may be directors, how such persons lose their status, what must be contained in rules and so on.

Most Acts affecting co-operatives contain provisions allowing for the hearing and resolution of "disputes" between the member and his society. This is a most useful provision although not frequently used in the formal sense. But because it is there the parties tend more readily to accept advice from the Registrar in the settlement of issues arising between them even prior to them reaching "dispute" proportions. The "dispute" provisions are designed to facilitate speedy and inexpensive resolution of contentious matters.

The third function of the legislation is one which is found in most Acts. This is the provision for penalties. In reflects the chief purpose for which law exists - that is to curb the activities of those who would otherwise seek to exploit their fellow man. It may seem somewhat anomalous that it is necessary to have such provisions in the law relating to co-operatives since co-operatives were set up principally to avoid situations of exploitation.

Registrars seem to exercise a considerable amount of discretion in taking action to prosecute and recover penalties. This has the effect of taking some of the law's arbitrariness away from it. Extenuating circumstances are recognised, but it is not easy always to know the full facts and a

Registrar may leave himself open to criticism if he fails to take prompt and timely action against a defaulter. In the same vein, a society which is not faithful in the little things, such as lodging annual returns on time, is often found to be wanting in the more important matters.

Speaking of annual return lodgement, we in New South Wales are copying company provisions by introducing a late lodgement fee and request for extension of time fee. Such provisions already are applied to co-operatives in some other States and no doubt are an encouragement to promptness and efficiency.

A category somewhat related to the last could be termed the "keeping people honest" provisions. These provisions require that the people who run societies observe certain reasonable requirements including making certain disclosures, obtaining proper audits, lodging accounts with the Registrar and observing the rights of members.

Generally speaking these are only the kind of procedures which any prudent person would follow and are not particularly onerous, although to harrassed society officials they may take on the nature of a burden at times.

One of the most important requirements here for some forms of co-operatives is that a lodgement of information at the Registry for subsequent availability for public search. This is a fairly potent incentive, encouraging societies that their manner of operation is beyond reproach.

This sort of provision to my mind is most desirable. It keeps the onus of involvement in and supervision of society affairs where it should be if a healthy, democratic movement is to be fostered - with the members. It is of great encouragement to find societies whose boards and members take their responsibilities seriously. I do not wish to seek to avoid my responsibilities as Registrar, merely to stress the desirability of Registrars keeping out of a society's affairs whilst ever the society can solve the problems.

Another function of the law which is closely related to one of the points mentioned earlier, and one which is not found in many statutes, reflects the desire of Governments to foster co-operation, or if not, at least to recognise that its operations are a little more altruistic than those of other "legal persons".

So it was that in my State there was a time when the Co-operation Act conferred on societies certain exemptions from income tax. By and large for most co-operatives those halcyon days are past. But they do emphasise the goodwill of the Government towards societies at that time. Other evidence of this attitude is to be found in the generally more lenient provisions relating to fees payable, qualifications of liquidators, etc. Sizable societies should not, however, be exempted from reasonable requirements of accounting and reporting to which public companies are subject.

The Act, in common with most State enactments dealing with co-operatives, provides for an Advisory Council drawn principally from the movement. This ensures that the Registrar and the Minister take note of the views of co-operators in the discharge of their duties and in the contemplation of Act amendments.

Another facet of the role of co-operative law is found in its function of preserving the unique character of co-operation. So the law identifies and embodies principles such as voting rights for all members, rebates in accordance with the volume of business transacted and limitation on dividend payable.

Under this heading also can be included unusual provisions such as those relating to the issue of additional shares to members out of moneys accumulated through their dealings with the society. The member may be required to take or subscribe for these shares where the scheme has been approved by the Advisory Council set up under the Act and by members.

This resume of the role of co-operative law is more or less to be understood as a historical treatment indicating my assessment of its purpose and role as it has been manifested in the majority of Australian States if not in every State. This is not necessarily to say that that should be the role to be adopted for the future. There is a lot to be said for reviewing one's goals and objectives and this process requires that one looks very critically at past practices to ensure that they are worthy of retention.

The only question now remaining is perhaps whether there are some areas which might at least be considered as appropriate to be covered by co-operative law which are not at present covered.

The only one which occurs to me relates to a role of co-operative legislation which is found in overseas countries.

In such places the co-operatives have a much greater State backing in the form of legislation as well as personnel and funds. Perhaps there is an element of coercion in such systems or if not of coercion then of a failure to provide any real choice. Such elements, in my view, would be unacceptable for our co-operative law. It is a breach of the co-operative philosophy to coerce and in any case it does not promote healthy co-operatives in the long run.

I have quoted Dr. William King on this subject before and make no apology for repeating his words here -

> "Co-operation is a voluntary act and all the power in the world cannot make it compulsory nor is it desirable that it should depend on any power but its own - the interference of Governments would only cramp its energies or misdirect them".

I believe that those words of the last century continue to be valid.

But it may be that legislation could be directed to creating a more favourable climate for the establishment and functioning of co-operatives. One rather minor illustration which I can give from my own State relates to a requirement of the Government that all licensed clubs should become corporate bodies.

When the necessary amendment was made to our Liquor Act it was provided (Section 134B) that such a club could either incorporate as a company or as a co-operative society registered under the Co-operation Act, 1923. Thus clubs were alerted to the possibility of considering co-operative status.

There might be scope for the law to provide for the establishment of one or more bodies within the State which are charged with the responsibility of financing co-operative activity.

Partly with this in view there has been agitation in recent years for a Co-operative Bank. Even if a fully pledged bank proved to be out of the question, a financial body with more limited objectives might be a possibility.

In the United States and Canada, Government backed financial institutions have been established to support and encourage public confidence in co-operatives.

In Australia it is very likely that the movement will have a need for substantial capital for development purposes and possibly to enable it to keep faith with members who should be helped to recover their share capital from societies. It is no doubt a weakness of our movement that members may not sell shares through the stock exchange and yet cannot in many societies realise on their shares even with adequate notice to their society.

In New South Wales we are becoming increasingly interested in the type of problems which are caused by these factors, allied to the severe problem of inflation. Whether or not Australians generally must resign themselves to an increased rate of inflation as some have suggested, co-operatives as a class may suffer an intolerable strain through its effects.

A system such as ours which is limited in the return payable to members on capital and which can hold out no prospect of capital gain is obviously vulnerable. There is a natural reluctance on the part of members to invest new funds with their co-operative under these conditions. Even accepting the existence of a loyalty transcending to some extent considerations of mere money, the greater the degree of inflation, the greater the disincentive to members to increase their investment in the society.

At the same time if the society holds real property among its assets, there is a strong possibility that inflationary effects have pushed values up. Other assets may be similarly affected (e.g., goodwill or franchise arrangements). Then the society becomes an attractive acquisition in the eyes of an outside body and a takeover campaign may be mounted.

My audience will be aware of the undersirable effects which will generally follow when a society is taken over for immediate financial gain. The influence of a co-operative is frequently much more significant than its size would indicate and apart from other effects its loss may remove the only real restraining influence on competitors. The community then suffers substantially.

It is even envisaged that a co-operative faced with these problems and limited in its defence mechanisms by the law under which it is registered, might seriously contemplate ceasing to be a registered co-operative and transfer to company registration. This in my view would be a severe indictment of co-operative law.

Some people in the movement in my State believe that societies should be free to issue bonus shares out of revaluation of assets - which would go a long way towards combating the problems in those societies able to proceed in this way. We are not convinced that such an approach is contrary to co-operative principles having in mind the great change in the economic climate which now applies as compared with what applied when the original principles were formulated.

This would probably involve an amendment to the Act. Whether or not such action is appropriate, and thus avoiding any contention of the merits or otherwise of such an approach, an amendment of this nature illustrates how important a role co-operative law plays.

It comes back to its function of deciding what a co-operative may do as well as perhaps underlining the need for the law to recognise and cater for the genuine needs of the movement.

It is perhaps a little away from my brief to dilate on this point, but I believe I should plead for the movement to do more to research and discover what its needs are before, perhaps, it is overtaken by difficulties, which cannot be solved sufficiently quickly to preserve its unique role. This involves expense, a cost which is rightly the prime responsibility of the movement rather than of Government.

As one of those charged with the duty of administering co-operative law I think I should conclude by affirming a strong belief in the merits of co-operative law. Although it has some inherent deficiencies, it has served the movement well and, through the movement, it has been of benefit to the community.

In New South Wales the time has probably come for a complete revision of our Act. After 50 years during which it has been amended on 41 separate occasions, it is in danger of having lost some of its conciseness and sequence.

Co-operators in our State have seized upon the opportunity provided by this Jubilee Year to bring to the attention of people in societies and credit unions and people not presently members, the merits of co-operation. We believe that co-operation can be of immense help in the modern community and are encouraging the promotion and publicising of the movement.

We realise that our legislation will need to be as modern and as flexible as possible if it is to meet the needs of the movement, especially if co-operators can in fact bring to public attention the scope of the movement and its ability to cater for the real needs of our citizens.

QUESTIONS TO - MR. D.A. HORTON

Q. W.W. Rawlinson - Co-operative Federation of Western Australia

What provisions are made in New South Wales Co-operative legislation to enable small Co-operatives to be liquidated at less cost than the normal process required for major business organisations?

A. Suitably experienced personnel acceptable to the Registry and not necessarily professionally qualified are permitted to act as liquidators of small units but they are controlled by the Registry. Costs are consequently reduced in the interests of these smaller organisations.

Q. A.R. Litchfield - Barossa Winery

Are there any prospects of uniform Co-operative law in Australia emerging from the regular meetings of Co-operative Registrars? If such uniform law is envisaged could it be a simple Act.

A. All State Co-operative Registrars would favour uniformity and as simple as possible

A. allowing as many provisions as possible to be controlled by Regulation rather than legislation.

However, Co-operative legislation is a State matter. Credit Unions are the one section of the Co-operative movement currently and actively engaged in drafting State legislation. They have revealed the various State requirements make the provision of uniform legislation very difficult to achieve. There is a similar experience in the case of Company legislation. In 1961 uniform legislation was introduced in each State of Australia but very soon State amendments started to be introduced with the result that now uniformity is far from a general standard in Company legislation.